

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LINH THI MINH TRAN,

No. 3:16-cv-00707-AC

Plaintiff,

ORDER

v.

OFFICER DARRYN J. KUEHL, OFFICER
BENJAMIN J. TOOPS, and OFFICER
RYAN KERSEY

Defendants.

HERNÁNDEZ, District Judge:

Magistrate Judge Acosta issued a Findings and Recommendation [123] on January 22, 2019, in which he recommends that this Court grant Defendants' Motions to Dismiss [56] [61] and dismiss Plaintiff's Second Amended Complaint [52] without leave to amend. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff filed timely objections to the Magistrate Judge's Findings & Recommendation. Pl. Obj., ECF 126. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Judge Acosta recommends dismissing Plaintiff's claims without leave to amend because: (1) the bulk of Plaintiff's claims are defeated by the Heck doctrine; (2) Plaintiff has "failed to provide additional factual allegations in support of her claims contrary to the court's prior order" and "such factual allegations are not forthcoming"; and (3) Plaintiff has already amended her complaint. F&R 19. To the extent that they are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court agrees with Judge Acosta that Plaintiff's claims should be dismissed without leave to amend.¹ However, to the extent that Plaintiff has otherwise failed to state a claim under Federal Rule of Civil Procedure 12(b)(6), Plaintiff should be allowed another opportunity to amend her complaint. The Court previously dismissed Plaintiff's complaint under Rule 8 and expressly declined to consider Defendants' motions under Rule 12(b)(6). F&R 5, ECF 45. Accordingly, this is the first time the merits of Plaintiff's claims have been addressed by this Court, and Plaintiff should have an opportunity to cure the defects noted in the Findings & Recommendation.

The Court has carefully considered Plaintiff's objections and the pertinent portions of the record de novo, and otherwise finds no error in the Magistrate Judge's Findings & Recommendation.


¹ This dismissal, however, is without prejudice as to a future habeas action or civil action should she succeed on appeal. See *Trimble v. City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995); *Hardaway v. County of Alameda*, No. C. 08-4322 JF (PR), 2008 WL 4962695, at *2 (N.D. Cal. Nov. 19, 2008) (dismissing claims barred by Heck "without prejudice to Plaintiff's filing a new complaint if the challenged conviction, sentence and/or parole denial are later invalidated").

CONCLUSION

The Court ADOPTS in part Magistrate Judge Acosta's Findings and Recommendation [123]. Defendants' Motions to Dismiss [56] [61] are GRANTED, and Plaintiff's Second Amended Complaint [52] is dismissed with leave to amend. A Third Amended Complaint, if any, must be filed within 14 days of this Order. Failure to file a Third Amended Complaint will result in dismissal of this action.

IT IS SO ORDERED.

DATED this 26 day of April, 2019.



MARCO A. HERNÁNDEZ
United States District Judge